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No. 83-743

In the Supreme Court of the United States

OCTOBER TERM, 1983

ARIZONA PUBLIC SERVICE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 387

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board acted within its discretion in finding that employees at petitioner's Palo Verde power plant constitute an accretion to the existing systemwide bargaining unit of production and maintenance employees.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 21-27) is unpublished. The decisions and orders of the National Labor Relations Board (Pet. App. 28-46, 47-71) are reported at 256 N.L.R.B. 400 and 259 N.L.R.B. 484.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1983. A petition for rehearing was denied on July 15, 1983 (Pet. App. 72-73). The petition for a writ of certiorari was filed on October 13, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a public utility supplying electric power throughout Arizona with headquarters in Phoenix. It operates seven nonnuclear generating plants in Arizona and New Mexico, and at the time period relevant here was in the process of building a nuclear power plant at Palo Verde, Arizona (the Palo Verde plant). Pet. App. 31; Tr. 352.[1] All of the plants, including the Palo Verde plant, are part of a single integrated power system centrally administered by the vice president of electrical operations in Phoenix.[2] Plant managers at each unit report to that office. The electric power generated by each plant feeds into the system and is centrally dispatched to customers throughout petitioner's service area. Pet. App. 31-32, 40-41.

The Union[3] has represented petitioner's production and maintenance employees in a single systemwide bargaining unit since 1947. When petitioner has by acquisition or construction added new plants to its system, employees at the new facilities have been incorporated into the contractual systemwide unit. Pet. App. 33-34. A total of about 1200 unit employees work at petitioner's seven nonnuclear plants (Pet. App. 33; Tr. 471-472). Petitioner began hiring production and maintenance employees at the Palo Verde nuclear plant in 1977. An initial complement of 62 employees was hired, including 12 or 13 (20%) who transferred from other plants in the system. Pet. App. 35-36; Tr. 62-63.[4]

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[1]"Tr." references are to the transcript of the hearing before the Board in the representation proceeding. "Exh." and "Jx" refer to petitioner's exhibits and joint exhibits, respectively, introduced at the hearing.

[2]The Palo Verde plant, 55 miles from Phoenix, is one of the closest to petitioner's headquarters (Pet. App. 31).

[3]International Brotherhood of Electrical Workers, AFL-CIO, Local 387.

[4]Petitioner asserts (Pet. 7) that there are currently 500 nonsupervisory employees at Palo Verde. This claim is not supported by the

The Palo Verde employees and bargaining unit employees perform similar functions under the same or comparable job classifications.[5] Thus, virtually all of the production and maintenance classifications at Palo Verde are included in the collective bargaining agreement (Tr. 474, 484-489; Jx 1 at 48-57, Exh. 5). The Palo Verde employees and the bargaining unit employees share similar terms and conditions of employment. The Palo Verde employees have the same vacation, holiday, pension, dental, and medical benefits as those contained in the collective bargaining agreement (Pet.

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record. In any event, the parties stipulated, and the Board found, "that although the number of employees will continue to expand, the present complement is representative" (Pet. App. 29), and petitioner does not contend that the Board's accretion determination was premature.

[5]Palo Verde employees classified as janitors, storekeepers and warehousemen perform the same duties as similarly classified bargaining unit employees (Tr. 85, 98). The duties of the Palo Verde electricians are the same as those of petitioner's other electricians (Tr. 86). Palo Verde employees classified as instrument and control (I & C) repairmen and technicians perform the same functions of calibrating, repairing and installing instruments that I & C repairmen perform at petitioner's other plants (Tr. 85, 419-420).

All plants have employees classified as "operators," and the operators at Palo Verde perform functions similar or parallel to those performed by the operators at the fossil fuel plants. At both Palo Verde and the fossil fuel plants, the operator functions are divided between operators who sit in the control room at control panels and those who travel throughout the plant checking equipment (Tr. 356-358, 481-482). The stationary operators—classified as control operators in the fossil fuel plants and nuclear operators level III at Palo Verde—are responsible for monitoring the condition of the plant and adjusting switches and knobs on the control panels in response to information about the condition of the plant conveyed by the instruments in the control room (Tr. 358-359, 371-372, 479). The mobile operators—classified as auxiliary or assistant operators at the fossil fuel facilities and as nuclear operators level II at Palo Verde—inspect the equipment throughout the plant (Tr. 481, 356-357). Nuclear operator level I is an operator trainee position and is similar to the operator trainee classification at the fossil fuel plants (Tr. 356).

App. 34-35; Tr. 114-115).[6] Furthermore, the salaries of Palo Verde employees are identical or comparable to the salaries earned by bargaining unit employees in the same or analogous classifications (Exh. 17; Jx 1 at 48-56).

In December 1980, the Union requested recognition as the collective bargaining representative of the Palo Verde employees, contending that they should be an accretion to the existing systemwide unit (Tr. 496).[7] On December 15, 1980, petitioner filed a petition with the Board requesting a representation election among the Palo Verde employees. On the same day the Union filed a petition for clarification of the systemwide unit to include the Palo Verde employees. Pet. App. 30-31.

2. On June 15, 1981, the Board issued a decision finding that the Palo Verde employees constitute an accretion to the systemwide production and maintenance unit (Pet. App. 43-45). The Board based its conclusion upon analysis of a number of factors, including the longstanding policy favoring systemwide bargaining units in the utility industry enunciated in *Baltimore Gas & Electric Co.*, 206 N.L.R.B. 199, 201 (1973), the integrated nature of petitioner's operations, the "community of employee interests" shared by the Palo Verde employees with their counterparts throughout the system, and the parties' bargaining history (Pet. App. 38-44). On the basis of its accretion finding, the Board dismissed petitioner's election petition and ordered that the existing unit be clarified to include the production and maintenance employees working at Palo Verde (Pet. App. 45).

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[6]The Palo Verde employees are treated no differently than petitioner's other unrepresented employees, all of whom receive many of the same benefits received by represented employees (Pet. App. 34-35; Tr. 131-132, 144-145, 274, 440-441, 491).

[7]An accretion is a group of new employees that are added to an existing bargaining unit without an election (Pet. App. 22 n.1).

3. Petitioner refused to recognize the Union as the representative of the Palo Verde employees and the Union filed an unfair labor practice charge in August 1981. The Board's General Counsel issued a complaint and moved for summary judgment on the ground that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the prior representation proceeding. The Board granted summary judgment, finding that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and ordering petitioner to recognize and bargain with the Union as representative of the Palo Verde employees. Pet. App. 55-56, 61-62.

4. The court of appeals enforced the Board's order. The court stated (Pet. App. 23-25; citations omitted):

> The question as to whether a group of employees represents an accretion to an existing bargaining unit is similar to the issue of the appropriateness of the determination of a bargaining unit. Such a determination is within the particular expertise of the NLRB; and it will not be disturbed absent an abuse of discretion.
>
> Relevant factors to be weighed in making the determination of whether a new group of employees should be considered an accretion include "functional integration of the business, centralized control of management, similarity of working conditions, collective bargaining history, local power to hire and fire, lack of employee interchange, [and] geographical distance."
>
> The critical determinant, however, is whether the employees share a substantially identical community of interests with the existing bargaining unit.

ARGUMENT

In determining whether a group of employees at a new facility—or resulting from any other change in an employer's operations—constitutes an accretion to an existing

bargaining unit, the Board examines a variety of factors. These include the similarity between the old and new groups in working conditions, job classifications, and skills and functions, as well as the integration of the employer's operations, the interchangeability of employees between the two groups, the geographic proximity of the job sites of the two groups, the centralization of labor relations and managerial control, and the employer's collective bargaining history. *The Great A & P Tea Co.*, 140 N.L.R.B. 1011, 1021 (1963).[8] Where the relevant factors demonstrate that the new employees have a community of interest sufficiently distinct from the existing unit to constitute an appropriate separate bargaining unit, the Board will not find an accretion. *Melbet Jewelry Co.*, 180 N.L.R.B. 107, 110 (1969); *Sheraton-Kauai Corp.* v. *NLRB*, 429 F.2d 1352, 1356 (9th Cir. 1970). However, where the new employees would not constitute an appropriate separate bargaining unit and share a community of interest with the unit employees, they will be accreted to the existing unit. See e.g., *NLRB* v. *Retail Clerks Local 588*, 587 F.2d 984, 987 (9th Cir. 1978); *NLRB* v. *St. Regis Paper Co.*, 674 F.2d 104, 107-108 (1st Cir. 1982); *Universal Security Instruments, Inc.* v. *NLRB*, 649 F.2d 247, 253 (4th Cir.), cert. denied, 454 U.S. 695 (1981).

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[8]The courts of appeals uniformly have approved the Board's consideration of these factors. See, *e.g.*, *NLRB* v. *St. Regis Paper Co.*, 674 F.2d 104, 108 (1st Cir. 1982); *Universal Security Instruments, Inc.* v. *NLRB*, 649 F.2d 247, 253 (4th Cir.), cert. denied, 454 U.S. 965 (1981); *Kaynard* v. *Mego Corp.*, 633 F.2d 1026, 1030-1031 (2d Cir. 1980); *Lammert Industries* v. *NLRB*, 578 F.2d 1223, 1225 (7th Cir. 1978); *NLRB* v. *Security-Columbian Banknote Co.*, 541 F.2d 135, 140-141 (3d Cir. 1976); *NLRB* v. *Sunset House*, 415 F.2d 545, 548 (9th Cir. 1969); *NLRB* v. *Food Employers Council, Inc.*, 399 F.2d 501 (9th Cir. 1968); *International Union, UAW* v. *NLRB*, 231 F.2d 237, 243 (7th Cir.), cert. denied, 352 U.S. 908 (1956).

The Board's policy balances the right of employees to select a bargaining agent against the policy of maintaining stability in established bargaining relationships (*The Great A & P Tea Co.*, 140 N.L.R.B. at 1023). Where the unrepresented employees have no separate community of interests from unit employees, assimilation of the unrepresented employees into the existing unit is necessary to preserve the stability of the existing bargaining relationship, for it places all similarly situated employees in the same position with respect to establishment of terms and conditions of employment. While the accreted employees do not have the opportunity to vote, they are in no different position in this regard from new employees who are hired for positions already included in an existing unit; such employees are logically indistinguishable from the accreted employees. On the other hand where the unrepresented employees would constitute an appropriate separate bargaining unit, they can properly be afforded a separate choice of a bargaining representative, and the interest in according them that choice outweighs any stability interest.[9]

Petitioner concedes (Pet. 4 n.2, 17-18) that the Palo Verde employees would not constitute an appropriate separate bargaining unit because of "the established principle of systemwide bargaining units in the public utility industry."[10] Petitioner contends (Pet. 11) that nevertheless

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[9]Petitioner's assertion (Pet. 10) that the Board's accretion determinations are subject to strict scrutiny upon judicial review is incorrect. The cases cited by petitioner stand only for the proposition that the Board itself will apply the accretion doctrine restrictively, because of the need to balance the statutory rights involved. See *NLRB* v. *Security-Columbian Banknote Co.*, 541 F.2d 135, 140 (3d Cir. 1976). The determination in each case is committed to the Board's discretion and should not be overturned unless found to be arbitrary and capricious. See *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947); *Universal Security Instruments Inc.*, 649 F.2d at 253.

[10]See *Baltimore Gas & Electric Co.*, 206 N.L.R.B. 199, 201 (1973).

the Palo Verde employees do have a "separate group identity" from the unit employees and therefore are entitled to an election to determine whether they wish to be included in the systemwide unit. There is no merit to that contention. The cases on which petitioner relies (Pet. 11-12) present situations where 1) a separate bargaining unit was found appropriate,[11] or 2) a group sought to be accreted had existed since the bargaining unit's formation but had been excluded from the unit by the parties, or had come into existence after a union's recognition but had been knowingly excluded from the unit for a substantial period of time.[12] In the latter situations, the bargaining history

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[11] *Pacific Northwest Bell Telephone Co.* 253 N.L.R.B. 795, 796 (1980).

[12] Thus, in *Photype, Inc.*, 145 N.L.R.B. 1268, 1272-1273 (1964), the Board, in ordering an election, emphasized the fact that the unrepresented employees sought to be accreted to the existing unit had been working for the employer for seven years and that the employees had been excluded from the bargaining unit for that period of time. Similarly, in *Remington Rand Division*, 190 N.L.R.B. 488, 489 (1971), the decisive factor in the Board's refusal to find an accretion and its direction of an election was a bargaining history of long-term exclusion of certain job classifications from the existing unit.

Petitioner's reliance on *Duke University*, 227 N.L.R.B. 1627 (1977); *Mt. Sinai Hospital*, 233 N.L.R.B. 507 (1977); *Metropolitan Hospital*, 223 N.L.R.B. 282 (1976); *Comax Telcom Corp.*, 219 N.L.R.B. 688 (1975); and *Connecticut Light & Power Co.*, 121 N.L.R.B. 768 (1958), is similarly misplaced. No party in those cases contended that the unrepresented employees constituted accretions to the existing bargaining units. Furthermore, the employees had worked outside the established bargaining units for a number of years before the issue of their representational status was raised.

Kroger Company, 201 N.L.R.B. 920 (1973) and *Utah Power & Light Co.*, 258 N.L.R.B. 1059 (1981) are also not accretion cases. *Kroger Company* involved employees who shared interests with two existing bargaining units represented by different unions. The Board directed an election to enable the employees to choose. *Utah Power & Light Co.* dealt with a group of professional employees who had been included in a unit with nonprofessional employees without an opportunity to vote. The Board directed a decertification election based on Section 9(b)(1) of

demonstrates that exclusion has not resulted in an unstable bargaining relationship and that the parties themselves have recognized that exclusion does not interfere with the bargaining relationship. Thus, unlike here, there is no countervailing policy to warrant limiting employee free choice. See *The Bendix Corp.*, 168 N.L.R.B. 371, 372 (1967).

Petitioner also appears to contend (Pet. 14-16) that the Palo Verde employees should not be found to be an accretion because they perform different functions and have different working conditions due to the fact that Palo Verde is a nuclear facility. This contention merely takes issue with the Board's finding, upheld by the court of appeals, that the Palo Verde employees share a community of interest with the unit employees based on "centralized labor relations policies, the similarity of classifications, functions, and terms and conditions of employment of Palo Verde employees and bargaining unit employees, and the transfers from unit positions to Palo Verde production and maintenance positions" (Pet. App. 42). This fact-bound disagreement raises no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1958). In any event, the Board's findings are amply supported by the record (see pp. 3-4, *supra*).

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the Act, 29 U.S.C. 159(b)(1), which prohibits including professional employees in such a unit unless the professionals vote for inclusion. There is no comparable statutory mandate here and the case is thus inapposite.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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